DODHILL (PVT) LTD — 1ST APPLICANT
SIMON DONALD KEEVIL — 2ND APPLICANT
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT — 1ST RESPONDENT
and
NYASHA CHIKAFU — 2ND RESPONDENT

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 10 March and 16 March 2009

Urgent Chamber Application

Miss *F. Mahere,* for applicants
Mr *K. Gutu,* for the first respondent
Mr W. *Bherebhende*, for second respondent

BERE J: The first applicant is Dodhill (Pvt) Ltd, a company with limited liability duly registered in accordance with the laws of Zimbabwe. The second applicant is the director and shareholder of first applicant.

First respondent is the Minister of Lands and Rural Resettlement, cited in his capacity as the acquiring authority and is responsible for the administration and implementation of the Land Acquisition Act [*Cap 20:10*] and other allied pieces of legislation currently in force.

Second respondent is Nyasha Chikafu who is in terms of the Land Acquisition Act [*Cap 20:10*] is the beneficiary of subdivision 1 of Dodhill in Chegutu District, Mashonaland West Province which incidentally the applicants claim to have legitimate right over. For purposes of this judgment I will refer to the property in question as Dodhill farm.

THE BACKGROUND

From the papers filed of record coupled with the submissions made by the two legal practitioners representing the applicants and the second respondent there are conflicting perceptions as regards the current status of Dodhill farm. The applicants feel very strongly that annexure '2' confirms their legitimate possession of the property. Annexure '2' is a court order which was consented to at a time when the other portions of the property were voluntarily conceded to the State for purposes of

agricultural resettlement following the formal gazetting of the applicants' farm in January of 2005.

The second respondent's position is that following the promulgation of the constitutional amendment number 17/05 Dodhill farm was properly allocated to her by first respondent.

I accept the position adopted by the second respondent that annexure '2' was overridden by the subsequent promulgation of constitutional amendment number 17/05 which culminated in the introduction of *inter alia* s 16B(2)(a)(i)[1] of the Constitution which conferred the ownership of the farm in question firmly in the hands of first respondent. I will therefore proceed on the basis that Dodhill, farm was indeed allocated to the second respondent.

APPLICANTS' CASE

The applicants' case is predicated upon the *mandament van spolie.* Their argument is that on the evening of Thursday, 5th day of February 2009, the second respondent without applicants' prior knowledge and consent summarily entered Dodhill farm and set up a camp near the main security gate housing the applicants' residence, barns and other buildings. A tent was put up as well as a makeshift shelter. The allegations went further to say that the second respondent introduced or brought with her some youth who camped in the premises.

On 20 February 2009 the second respondent summarily and without the consent of the applicants commenced ploughing in the applicants' fields where tobacco had just been harvested and on which the applicants had intended to plough an onion crop, in conformity, with the applicants' programme of rotational cultivation.

The applicants outlined other incidents which amounted to the second respondent's summary occupation of Dodhill farm.

The applicants sought the services of the police to have the status *quo ante* restored but to no avail.

According to the applicants, when the second respondent was confronted she said she had a right to occupy Dodhill farm on the strength of her offer letter, a copy of which is marked annexure '3' in the papers filed of record.

THE SECOND RESPONDENT'S CASE

[1] The Constitution of Zimbabwe

The second respondent's response to the allegations of unlawful dispossession were basically three-pronged, viz lack of urgency in this matter, lack of *locus standi* on the party of the applicants in bringing this application and in the alternative, a complete denial of the allegations levelled against her by the applicants.

In order for one to effectively deal with the second respondent's two main defences one must consider whether the allegations by the applicants are true or not. If they are not, the two main defences would fall away.

If the allegations are found to be true, the court must then proceed to deal with those allegations in so far as they impact on the defences of lack of urgency and *locus standi* on the applicants

THE ALLEGATIONS BY THE APPLICANT

In her notice of opposition, the second respondent has emphasized the point that the ownership of Dodhill farm now vests in first respondent and the fact that her offer letter authorizes her to stay on the farm in question to carry out agricultural activities.

I wish to re-affirm the accepted legal position that in applications for a spoliation order the question of ownership of the property in issue does not arise. As I will demonstrate later in this judgment, lawfulness to possession of the farm is equally irrelevant.

There are numerous aspects which can be gleaned from the second respondent's notice of opposition which confirm the allegations levelled against her not only on a balance of probabilities but beyond reasonable doubt.

Firstly, despite her attempt to paint the picture that the applicants consented to her occupation of the farm the second respondent gives a completely different picture when she states:

> "…. Applicants seem to be complaining that I should have sought their permission first before ploughing and that they wanted to plant onions on the land which I ploughed. I am advised which advise I accept that I have the lawful authority to carry out agricultural activities at the farm in the farm of an offer letter. Since applicants do not own the farm there is no reason at all for me to seek their permission to do that which is lawful.
>
> In any event the applicants have no right whatsoever to continue carrying out agricultural activities at the farm since doing so amounts to a criminal offence. I

> intend to allow applicants to finish harvesting their crops before I commence to prepare the land…." [2] my emphasis.

In my view, the above averments confirm the point made by the applicants that the second respondent simply moved on to Dodhill farm without their consent because in her view (of course as advised by her counsel) the applicants have no right to be on the farm.

It is inconceivable that given her perception of the law as advised by her counsel, the second respondent would have sought the consent of the applicants before occupying the disputed property.

Further in her affidavit the second respondent confirms that there were fights between her own employees and those of the applicants which culminated is some employees being arrested by the police from Chegutu.

If the second respondent had occupied the farm in question by consent there would have been no cause to have such running battles on the farm between the two groups of employees.

All in all, I am satisfied that a cursory perusal of the second's respondent's affidavit lends credence to the allegations raised by the applicants. I have absolutely no doubt in my mind that the second respondent acted in the manner complained of by the applicants.

THE QUESTION OF URGENCY

If the court accepts the allegations as raised by the applicants (which the court is inclined to accept) for reasons already outlined, then it was inevitable that this matter be brought to court on an urgent basis.

There is no standard formula which determines the issue of urgency. Every case must be looked at within its own context. This is one case where urgency is justifiable because of the manner in which, the second respondent took occupation of Dohill farm.

It must be understood that the applicants' initial decision to involve the police was both natural and reasonable in the circumstances. It was only when the police could not assist that the applicants thought of lodging the instant application.

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[2] Para 13 of second respondent's opposing affidavit

In any event, our courts have held in some cases that delays in instituting *mandament van spolie* proceedings do not necessarily amount to acquiescence in the dispossession.[3]

LOCUS STANDI

The issue of *locus standi* on the part of the applicants cannot be looked at in a vacuum. It must be looked at in the light of the legal position governing the principle of the *mandament van spolie.*

THE LEGAL POSITION

There can be no doubt that spoliation as a remedy has its core value or objective, protection to possession of property against unlawful dispossession.

This is a remedy that has been recognized in our jurisdiction and beyond for over decades.

In dealing with the principles of spoliation I find the views of HERBSTEIN J quite apposite when the learned judge stated:-

> "… two allegations must be made and proved, namely, (a) that applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent" [4]

In Amler's Precedents of Pleadings[5] it is stated, "Unlawfulness in this context means a dispossession without plaintiff's consent or due legal process".

This time honoured principle of our law has been enunciated in a plethora of cases in our jurisdiction and beyond. See for example, *Nino Bonino v De Lange[6]* , *Silo v Naude[7]* , *Mutsotso and Others v Commissioner of Police and Anor[8], Chisveto v Minister of Local Government and Town Planning[9].*

In the classic and leading case of Nino Bonino (*supra*) INNES C, J (as he then was) had this to say:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or

[3] Manga v Manga 1991(b) ZLR 251 @ 255
[4] Bennet Pringle (Pty) Ltd v Adelaide Municipality 1977 (1)SA 230E at 233
[5] 3rd Edition LTC Harm and JH Hugo, Butterwarths at pp 276-277
[6] 1906 TS 120 at 122
[7] 1929 Ad 21
[8] 1993 (2) ZLR 329 (H)
[9] 1984 (1) ZLR 248 (H)

> immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute"

In Chisveto's case (*supra*) REYNOLDS J remarked as follows;

> "Lawfulness of possession does not enter into it. The purpose of the mandament van spolie is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the status *quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party …. The lawfulness or otherwise of the applicants possession of the property does not fall for considerations at all. In fact the classic generalization is sometime made that in respect of spoliation actions … even a robber or thief is entitled to be restored possession of the stolen property."[10]

Counsel for the second respondent passionately argued that the applicants had no *locus standi* to bring an application for spoliation. The main thrust of his argument was that because the applicants had exceeded the 45 and 90 day statuary maximum periods which allows them to remain on the farm and the homestead respectively,[11] therefore the applicants must not be protected by this court.

In counsel's view, which borrowed heavily from the position adopted by my learned brother UCHENA J in the case of *Andrew Roy Ferrera and Katambora Estates (Pvt) Ltd v Bessie Nhandara*,[12] if this court accepted *locus standi* on the part of the applicants, then the court would be sanctioning an illegal stay on Dodhill farm by the applicants since the applicants are occupying that farm in complete violation of the law.

There was also an attempt by the second respondent's counsel to seek to rely on the decision by their Lordships in one of the much celebrated land cases in this country, viz *Airfield Investments (Private) Limited v*

(1) The Minister of Lands, Agricultural and Rural Resettlement

(2) The Minister of Justice Legal and Parliamentary Affairs

(3) The Member in Charge, Chegutu Police Station

(4) *The Attorney General of Zimbabwe and (S) R Sango.*[13]

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[10] Page 250 A-D
[11] Section 3 of Gazetted Land (Consequential Provisions) Act [*Cap 20:28*]
[12] HC 3995/08
[13] SC 36/04

Simplified, the argument as put forward by second respondent's counsel was that because the applicants' hands are tainted with their illegal occupation of Dodhill farm, the court could not entertain them let alone grant them an order that would perpetuate their continued stay on the farm.

Applicants counsel held a different view. She argued that once the applicants' possession is established and there is proof of dispossession without reference to due process applicants' *locus standi*, is thereby established. I agree with this position.

The position adopted by the second's respondent's counsel is fraught with so many challenges.

Firstly, his approach would be an attempt to re-define the very basic requirements of a *mandament van spolie* which is not concerned with the legality or otherwise of the possession itself. See the remarks of REYNOLDS J in Chisveto's case (*supra*).

I am fully cognisant of other decisions from South Africa which have attempted to shift from the orthodox approach in dealing with spoliation matters. One such matter is the case of *Parker v Mobil Oil Southern Africa (Pvt) Ltd*[14] where VAN DEN HEEVER J stated as follows;

> "Moreover, the rule that goods dispossessed against the will or the possessor must be restored forthwith, is not an absolute one. The reason for the rule is, according to the authorities, certainly not because the fact of possession is elevated to a right stronger than *plenum dominimum,* but to discourage breaches of the peace by self help in the case of disputes. Despite generalizations that even the thief or robbers entitled to be restored to possession, I know of no instance where our courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right vis-à-vis the respondent to the possession he seeks to have restored to him". (my emphasis)

Commenting on Parker's case and another similarly decided case of *Coetzee v Coetzee*[15]the learned judge MAKARAU J in the recent case of *Shiriyekutanga Bus Service v Total Zimbabwe* remarked as follows:

> "With respect, the weight of authority appears to be against the learned judge. It has not bee established as part of our law in any other decided case that an application for spoliation order has to show some reasonable or plausible claim to the property despoiled.

[14] 1979(4) SA 250 @ 255
[15] 1982(1) SA 933

> The learned judge seems to suggest that the court determining an application for a spoliation order will look into but possession of the applicant. (See *Coetzee v Coetzee,* (*supra*). I hold a different opinion and do so with the greatest of respect and due deference to the learned judge. The decided cases referred to by, GUBBAY CJ in *Botha and Another v Bennet* (*supra*) are quite clear that the court does not at all look into the juridical nature of the possession claimed.
>
> The doctrine of *stare decisis* binds me to follow the decision in *Botha and Another v Bennet* (*supra*) and *Coetzee v Coetzee* (*supra*)"[16] (my emphasis)

I entirely associate myself with the position adopted by the learned judge MAKARAU J that in an application for spoliation order an applicant does not have to prove some reasonable or plausible claim to the property, let alone the legality or otherwise of his possession of the property in question.

With extreme due deference to the learned judge UCHENA J, I do not agree with the approach he seems to have adopted in the Andrew Roy Ferreira case (*supra*) when he made a finding that because the applicant in that case had defiantly continued to be on the farm in question, therefore he could not be granted spoliation.

In my view the learned judge prematurely dealt with the rights of the parties to the farm when in fact this was not the issue at stake. It does seem to me that all the learned judge was supposed to consider was whether or not the applicant had been in peaceful and undisturbed possession of the farming land prior to the alleged dispossession and not to consider who was legally supposed to have been in possession of the farming land at the time of the alleged dispossession by the offerree. In any event, such an approach in my view went against the weight of decades of precedent in spoliation matters.

The second challenge which is apparent from the position adopted by the second respondent's counsel is the failure to appreciate that by denying the applicants *locus standi* the court will be sanctioning and encouraging self-help exercise by those in the position of the second respondent. In my view such a position would be tantamount to perpetuating an infraction of the law to the dispossession by the second respondent without following due process of law.

I hold a very strong view that it was certainly not the intention of the legislature to give those armed with offer letters like the second respondent powers of evicting

[16] HH 64-2008

defiant former farm owners like the applicants. Such a scenario would create chaos in our farms.

Our courts must be careful not to encourage lawlessness in our farms by subtley condoning by implication or inference the conduct of land beneficiaries who believe they have a legitimate right to occupy land which hither-to belonged to those farm owners who choose to stubbornly or defiantly remain on the farm at a time they should have vacated. It is not a question of weighing who between the former owner and a beneficiary has a preferred or a more appealing right. It is simply a question of encouraging due process of law. This is not achieved by giving court orders which give the impression offerrees can themselves carry out eviction processes.

The legislature was quite conscious that there would be defiant former farm owners who would endeavour to continue with farming operations after the lapse of the 90 day statutory period. In its wisdom the legislature created a specific procedure to deal with such errant or defiant farmers. This procedure is well spelt out in the Gazetted Lands (Consequential Provisions) Act.[17] My brother judge HUNGWE J correctly summed up the procedure when he stated:

> "There is a specific procedure for eviction in respect of land acquired in terms of the Gazetted Lands (Consequential Provisions) Act, [*Cap 20:28*]. The right to claim eviction in only exercisable by the acquiring authority. That process is not initiated by a beneficiary under the land reform programme or by an officer of the acquiring authority"[18]

Consistent views were also echoed by my brother judge BHUNU J when he stated:

> "Although the applicant is entitled to occupy the land he is not entitled to evict the former owner……. because he does not own the land and has not at any stage acquired possession.
>
> It is now settled law that a lessee who has not acquired vacant possession cannot evict anyone from the property. It is the prerogative of the acquiring authority to evict the first respondent".[19]

I note with extreme discomfort that second respondent's counsel has referred to the Airfield Investment (Pvt) Ltd case (*supra*) as authority for the proposition that applicants have no *locus standi* in this case. With respect that case

[17] Section 3-5 of Chapter 20:28
[18] Pondoro (Pvt) Ltd and Another v Nemakonde and Anor HH 18-08
[19] Zakeyo Mereki v Bell In (Pvt) Ltd and Deputy Sheriff Harare (N.O)

has been quoted out of context. That case is quite distinguishable from the instant case. In that case the focus was on considering the requirements of an interim interdict as opposed to the instant case which is primarily focused on considering the requirements of a *mandament van spolie*. These two principles are quire distinct and cannot be mistaken for each other.

Counsel for the second respondent also argued that according to his understanding s 16B of the constitution of Zimbabwe as well as s 3 of the Gazetted Lands (Consequential Provisions) Act (*supra*) have taken away the remedy of spoliation from our common law.

I have painstakingly perused the cited sections. I do not agree with such sentiments.

In the final analysis, I am more than satisfied that the applicants have *locus standi* to bring this action and having accepted their allegations against the second respondent I am inclined to grant the provisional order sought in terms of the papers filed.

Gollop & Blank, applicant's legal practitioners
Mr K. Gutu, for 1st respondent
Mavhunga & Sigauke, 2nd respondent's legal practitioners